

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 62 of 2007 , Appeal No. 73 of 2007, Appeal No. 127 of 2007 and Appeal No. 48 of 2010

Dated: 24th May, 2011

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member,
Hon'ble Justice P.S Datta, Judicial Member,**

In The Matter Of

Appeal No. 62 of 2007

M/S. Utkal Chamber and
Commerce and Industry
N/6, IRC Village
Nayapalli, Bhubaneswar
Orissa

.....Appellant(s)

Versus

1. Orissa Electricity Regulatory
Commission
Vidyut Niyamak Bhawan
Unit-VIII, Bhubaneswar
Orissa-751012
2. Western Electricity Supply
Of Orissa Ltd.(WESCO)
Plot No. 123, Sector-A, Zone-A,
Mancheswar Industrial Estate
Bhubaneswar
Orissa-751010

3. North Eastern Electricity
Supply Co. of Orissa (NESCO)
Plot No. 123, Sector-A, Zone-A,
Mancheswar Industrial Estate
Bhubaneswar
Orissa-751010
 4. Southern Electricity
Supply Co. of Orissa (SOUTHCO)
Plot No. 123, Sector-A, Zone-A,
Mancheswar Industrial Estate
Bhubaneswar
Orissa-751010
 5. Central Electricity Supply
Utility of Orissa Ltd. (CESU)
IInd floor, IDCO Tower
Bhubaneswar-751022
-Respondents

Counsel for Appellant: Mr. Ashok Kumar Parija, Sr.Advocate
Mr. Anoop Choudhary, Sr.Advocate
Mr. Ghanshyam Yadav
Mr. Suresh Tripathy
Mr. N.K. Sahoo
Mr. M.V.Rao
Mr. R.P.Mohapatra

Counsel for Respondent(s): Mr. Hassan Murtaza for R.2 to 4
Mr. R.K. Mehta
Mr. Antaryami Upadhyay
Mr. S. Lakhi Singh for R-5
Mr. Rutwik Panda for OERC
Mr. Shiv Suri
Ms Smieetaa Inna
Ms Suman Kukrety
Mr. Syed Naqvi
Mr. K.V. Balakrishnan for OERC

Appeal No. 73 OF 2007 & IA No.93 of 2007

In The Matter Of

M/S. SCAN Steels Limited,
Main Road, Rajgangpur
Distt. Sundergarh
Orissa

.....Appellant(s)

Versus

1. Orissa Electricity Regulatory Commission
Vidyut Niyamak Bhawan
Unit-VI, Distt. Khurda
Orissa-753101

2. Western Electricity Supply
Of Orissa Ltd.(WESCO)
Corporate office, Burla
At / Post Office Burla
Distt. Sambalpur
Orissa

....Respondents

Counsel for Appellant(s): Mr. Suwendu S.Dash
Mr. Ashok Panigrahi
Mr. Shiv Kangungo
Ms Sylpy Chaturvedi

Counsel for Respondent(s): Mr. Hassan Murtaza for R.2
Mr. Shiv Kaungo
Mr. Rutwik Panda for OERC
Mr. Shiv Suri
Mr. Buddy A. Ranganadhan
Mr. R.K. Mehta
Mr. Antaryami Upadhyay
Mr. Lakhi Singh
Ms Smieetaa Inna

Appeal No. 127 OF 2007

In The Matter Of

M/S. Rawmet Ferrous Industries Pvt Ltd,
Anantapur, Dhurusia, Athagarh,
Distt-Cuttack,
Orissa-754 029

Versus

1. Orissa Electricity Regulatory Commission (OERC)
Vidyut Niyamak Bhawan
Unit-VI, Distt. Khurda
Orissa-753101
 2. Central Electricity Supply Utility,
IDCOL Tower,
Janpath,
Bhubaneswar,
Orissa-753 101
 3. Orissa Power Transmission Corporation Ltd.
Office of Chief Engineer
(Transmission Project),
3rd Floor, Bidyut Bhawan,
Janpath, Saheed Nagar,
Bhubaneswar, Distt-Khurda,
Orissa
-Respondents

Counsel for Appellant(s): Mr. Milan Kanungo
Mr. Ashok Panigrahi
Mr. S.S.Dash

Counsel for Respondents: Mr. R.K. Mehta
Mr. Jitendra Mohapatra
Mr. Amit Singh
Mr. Rutwik Panda
Ms Suman Kikrety
Mr. Gaurav Srivastava

Mr. Antaryami Upadyay
Mr. Lakhi Singh
Ms Sangita Pradhan
Mr. Hasan Murtaza

Appeal No. 48 of 2010

In The Matter Of

M/S. Shree Metaliks Limited
Mukundapur,
PO-Paranga, PS-Angul,
District-Angul
Orissa-759 122

... Appellant(s)

Versus

1. Orissa Electricity Regulatory Commission (OERC)
Vidyut Niyamak Bhawan
Unit-VI, Bhubaneswar
Orissa-753101

2. Central Electricity Supply Utility,
IDCOL Tower, IInd Floor,
Janpath, Distt-Khurda,
Bhubaneswar,
Orissa-751022

3. State of Orissa,
Department of Energy,
Orissa Secretariat, AT/PO Bhubaneswar,
District-Khurda,
Orissa -751001

....Respondents

Counsel for Appellant(s) Mr. Shiv Kaungo
Mr. Ashok Panigrahi
Mr. S.S.Dash

Counsel for Respondent(s): Mr. Rutwik Panda
Mr. R.K. Mehta
Mr. Antaryami Upadhyay
Mr. S. Lakhi

JUDGMENT

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

These Appeals have been filed by the Appellants aggrieved by the Tariff Order dated 23.3.07 passed by the State Commission determining the Retail Supply Tariff for the year 2007-08. Since, the issues are the same, common judgement is being rendered in all these Appeals. The short facts are as under:

2. The Appellants are High Tension (HT) and Extra High Tension (EHT) Consumers. The Distribution Licensee, the Respondent filed the Annual Revenue Requirement Petition before the State Commission. They had sought for some changes in retail supply tariff for the HT Consumers for the reason that there was a rise in the bulk supply tariff. In addition to that, the Distribution

Licensee had sought for Govt subsidies to prevent any increase in retail supply tariff.

3. The State Commission called for the objections and suggestions from the members of the public and the persons concerned. Accordingly, same were filed by the parties before the State Commission. Ultimately, the State Commission passed the impugned order dated 23.3.2007 reducing the tariff incentives to the Appellants and similarly placed consumers.

4. Aggrieved over this, these Appeals have been filed by various HT and EHT consumers, the Appellants herein.

5. The Learned Counsel for the Appellants would make the following submissions contending that the impugned order would suffer from various infirmities. Those submissions in brief are as follows:-

(i) The impugned order of the State Commission is wrong in withdrawing the incentives even when there was no such prayer by the Distribution Licensee with regard to the revision of the incentive tariff.

(ii) The Distribution Licensee in its ARR proposal had not sought for any change in the tariff for the HT Consumers and on the contrary, the Distribution Licensee had merely sought for Government subsidy so as to prevent any change or increase in retail supply tariff.

(iii) The impugned order is in utter violation of the Orissa Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations 2004, wherein determination of ARR is statutory obligation of the Commission. These Regulations provide for carving out a road map for continued development of the electricity sector by

balancing the conflicting interests of various stake holders.

(iv) The impugned order had not taken into account the guiding principles enshrined in National Electricity Policy and National Tariff Policy.

(v) The procedure followed by the Commission in cross subsidizing the burden of Low Tension consumers to the High Tension Consumers is not tenable as the law provides that there must be a constant endeavour to reduce the element of cross subsidization.

(vi) The State Government issued a clear direction to the State Commission that there should be no tariff hike till 2009. But this was not obeyed by the State Commission which is a utter violation of the Section 108 of the Act.

(vii) The decision of the Commission revising the tariff for HT/EHT Consumers has been taken by the Commission without hearing the parties concerned in violation of the principles of natural justice.

6. On these grounds, elaborate arguments were advanced assailing the impugned order by the Learned Counsel for the Appellants. On the other hand, the Learned Counsel for the Respondents made a detailed reply in justification of the order impugned and pointed out various reasons given in the impugned order.

7. Now, the main questions that may arise for consideration are as follows:

(i) Whether the procedure followed by the State Commission in cross subsidizing the burden of Low

Tension (LT) Consumers to Extra High Tension (EHT) Consumers/High Tension (HT) Consumers was proper when the constant endeavour should be to reduce the element of the cross subsidy?

(ii) Whether the State Commission was right in reducing the incentives to the extent as stated when the Distribution Licensees, in their Application for determination of tariff in ARR had sought no changes in the incentive tariff for HT/EHT consumers?

(iii) Whether the impugned order has taken into consideration, the policy directives of the State Government issued U/S 108 of the Act in public interest which has categorically directed that there should be no tariff hike till the year 2009 and it is the responsibility of the Distribution Companies to bring down the distribution losses and AT&C losses

as per the State Commission's Business Plans failing which, the Distribution Companies should meet the non achievable targets by means of their own financial arrangements?

8. We have heard the Learned Counsel for the parties on these questions and have given our thoughtful considerations to the questions framed in this case.

9. These Appeals have been filed to set aside the retail supply tariff for the year 2007-2008 in so far as the withdrawal of the incentives drawn by the HT/EHT Consumers is concerned.

10. Admittedly, there was an agreement between the Distribution Licensee and the Appellants for the supply of electricity in which the Appellants have consented for revision of tariff according to the tariff notified by the State Commission from time to time.

11. As per Clause 6 of the said agreement, the Appellant had expressly agreed to pay for the power supply under minimum monthly charges, demand charges and energy charges in accordance with the provision of the Distribution (Conditions of Supply) Code, 2004 and as notified in the tariff notification from time to time. The Appellant having agreed to pay the energy charges as determined by the State Commission can not turn around now and question the order of the Commission for revising the tariff.

12. The retail supply tariff for any year is determined by the State Commission based on the bulk supply price, transmission charges and distribution cost of the Company.

13. The State Commission has given various reasonings while reducing the incentive for the HT and EHT

category. The State Commission took cognizance of the fact that the cost of bulk purchase of electricity has increased by 41.90 Paise per unit on an average with respect for FY 2005-06 to the Distribution Companies. The State Commission also noted that the sale of power @ 150/180 paise per unit at EHT and 170/200 paise per unit at HT would amount to a subsidy from other consumers to these consumers. In earlier years, when incentive was given to the consumers who would not reduce their contract demand during the next three years, there was lower utilization of NTPC Power Stations, inadequate evacuation facility and need to encourage lesser use of captive power. The situation has since changed with strengthening of evacuation facility and demand for harnessing captive power. There has been growth in individual demand requiring higher quantum of power purchase from costly sources.

14. In the tariff application, the Distribution Licensee has prayed for bridging the revenue gap through combination of increase in retail supply tariff, reduction in bulk supply tariff and Government subsidy, etc.

15. The Commission is to be guided by Section 61 (d) of the Electricity Act. According to this, the State Commission shall have to take into consideration the consumer interest and at the same time, recovery of the cost of the electricity in a reasonable manner while determining the tariff. By doing so, the State Commission took note of the fact of increase of bulk supply tariff by 31% and consequently determined the retail supply tariff.

16. The tariff is to be determined on annual basis. Accordingly, the State Commission has determined the tariff for the year 2007-08 as per the Regulation.

17. In the impugned tariff order, 2007-08 the incentive tariff has not been withdrawn. On the other hand, the incentive tariff component is revised considering the cost of the power as per Section 61 (d) of the Act. The Appellant who was an objector in the public hearing was also aware about the prayer of the Distribution Licensees to bridge the revenue gap in the then prevailing retail supply tariff and bulk supply tariff. As the Appellant was heard by the State Commission over this aspect, it cannot be contended that there is a violation of principles of natural justice.

18. According to the Appellant, the State Government issued a letter dated 1.2.2007 for continuance of tariff without any hike till 2009 and this direction has not been obeyed. The Electricity Act provides that the State Government can give directions in regard to the tariff only as per the Section 65 of the Act. As per Section 108 of the Act, the State Government can issue policy directions

involving public interest. As per Section 12 of the Orissa Electricity Reform Act, 1995, the direction of the State Government shall be consistent with the object of the Act. Section 65 of the Act provides that in spite of the directions under section 108 to grant subsidy to any class of consumers, the State Government has to provide the upfront subsidy to the class of consumers.

19. In this context, we quote Section 65 of the Electricity Act 2003. Section 65 of the Electricity Act, 2003 which provides as under:

“65. Provision of Subsidy by State Government

If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under Section 62, the State Government shall, notwithstanding any direction which may be given under Section 108, pay, in advance and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licensee or any other person concerned to implement the subsidy provided for by the State

government: provided that no such direction of the State Government shall be operative if the payment is not made in accordance with the provisions contained in this section and the tariff fixed by the State Commission shall be applicable from the date of issue of orders by the Commission in this regard”.

20. As per Section 108 of the Electricity Act, 2003, the State Government can issue policy directions to the State Commission involving public interest. The State Government is also entitled to issue policy directives considering the subsidies to be allowed for the supply of electricity to any class or any classes of consumers or in respect of the directions of the State Government under Section 108. If the State Government has to provide the subsidy or any tariff concession to the class of consumers, the same has to be mentioned and the subsidy has to be provided upfront.

21. In view of the above, the said letter dated 1.2.2007 can not be treated as a direction under section 108 of the Act. In other words, the power of tariff fixation of the State Commission has not been vested with any authority

of the State Government to issue any direction in the name of policy directives.

22. The State Commission has adopted the loss level mentioned in the Business Plan in line with the letter dated 1.2.2007 of the State Government. In fact, the State Government under the Regulations, 2004 has to make estimation of the Distribution Loss based on several aspects. The Regulations are statutory in character. The procedure prescribed therein has to be followed by the Commission instead of confining to the Business Plan targets.

23. As held by this Tribunal earlier, the targets set-up by the State Commission for the Financial Year 2007-08 were unrealistic and distribution Companies were starved of finances as the tariffs approved by the State Commission did not cover the approved costs. Even though Bulk supply Tariff has been increasing, there is no

corresponding increase in retail supply since 2001-2002. In the Financial Year 2007-08, the approved reduction in the distribution losses with respect of the previous year was 11.5% for WESCO, 6.8% for NESCO and 13% for SOUTHCO.

24. As per the clause of special agreement the tariff and conditions to supply shall be subject to any revision that may be made by the State Commission from time to time. Therefore, the Appellant is bound by the tariff of the conditions and mandated by the State Commission from time to time. The Regulation further provided that the tariff order shall have continued to be in force for such a period till it is mandated or revoked by the Commission.

25. The retail supply tariff for any year is determined by the State Commission based on the bulk supply prices, transmission charges and distribution cost of the Company. The Commission has increased the bulk

supply price in the impugned order dated 23.3.2007, which on composite basis including the transmission tariff has increased by 35% incase of Distribution Companies over the applicable bulk supply tariff paid by the Distribution Companies in the year 2005-06.

26. The reduction of the incentives in tariff for HT/EHT consumers is less then the effect of the inflation as clearly elaborated by the Commission in para 5.36 of the impugned order. According to the Appellant, the increase in the retail supply tariff is 10% to 13%. This increase is only over the energy charges for the proportion of incentive tariff for the consumption above 50% consumption ratio. The overall increase in rate of electricity has not been above 5.3% and 5.6% for HT and EHT categories respectively as indicated by the State Commission in the impugned order.

27. The State Commission as indicated above has given sufficient reasonings while revising the incentives in the HT and EHT category contained in para 5.35 of the impugned order. The same is reproduced as below:

“5.35 Incentive for higher consumption to HT and EHT Group of consumers:

(i) The existing provision of incentive tariff for HT and EHT consumers was examined.

(ii) The Commission also analysed the expected load growth for HT and EHT consumers for the ensuing Financial year 2007-08. It is observed that there will be substantial rise in HT and EHT consumption over the period 2006-07 and certainly much higher figure than the actual figures of 2005-06.

(iii) The Commission took cognizance of the input cost of power procurement from GRIDCO by the distribution companies through payment of bulk supply price.

(iv) The Commission had also directed that the incentive shall be available to those of the consumers who will not reduce their contract demand during the next three financial years starting from financial year 2005-06.

(v) The overall bulk supply price for the FY 2005-06 by GRIDCO to DISTCOs was 120.85 paise per unit which included a transmission charges of 25 paise per unit. Essentially, the energy price per unit for sale of power by GRIDCO to DISTCOs for that year works out to 95.85 paise per unit. For the ensuing year 2007-

08, the overall power purchase price of DISTCOs is 135.66 paise excluding the transmission charges payable over and above this. A comparison of bulk power purchase cost between 05-06 and 07-08 indicates that there has been a price rise to the tune of $(135.66 - 95.85) = 39.81$ paise per unit for DISTCOs. Applying a transmission loss of 5% for EHT transmission the difference in purchase price is 41.90 paise per unit which is in excess over and above the purchase price of 05-06.

(vi) We have rationalized tariff structure for the Financial year 2007-08 with the objective of resource realization from the consumers who are being supplied power at a reasonably low price. Due to higher sale at HT and EHT consumers sale of power @ 150/180 paise per unit at EHT, 170/200 paise per unit at HT would amount to a subsidy from the general pull of consumers to these consumers as they continue to pay at a lower rate for the proportionate energy they are billed at that rate because the purchase price has gone up by 42 paise per unit from the time this rate was fixed in the Financial Year 2005-06. Continuance of this rate would not only mean subsidies for these group but also loss of revenue which has to be mopped up by distributing it among other classes.

(vii) Ordinarily, power to this group should have been supplied @ 290 paise per unit (EHT)/300 paise per unit (HT) apart from demand charges. By allowing this incentive they have been supplied power at a lower rate on several grounds discussed in the appropriate tariff order. At that point of time lower capacity utilization of NTPC power station and absence of evacuation facility needed supply of power at a lower cost to encourage lesser use of costly captive power.

(viii) Today, the situation is different. Evacuation facility is strengthened. With intra-state and inter-state tie up there is demand for harnessing the captive generation.

(ix) There has been a growth of industrial activity in the state requiring higher quantum of purchase from costly generating sources both inside and outside to meet the needs of the industrial consumers raising the weighted average price per unit of supply. We have also seen that the industries with captive generating plant have contracted with GRIDCO supply of power @ 202 paise per unit. At least such of the industries should not purchase power at the present applicable rate causing a loss to the supplier.

(x) Keeping all these factors in view, the commission directs that the HT and EHT consumers shall pay the energy charges effective from 01.4.07 at the rates indicated in the table below:

Table-19

	HT	EHT
Consumption upto 50%	300 p/u	290 p/u
>50% =<60%	225 p/u	202 p/u
>60%	220 p/u	202 p/u

5.36 We are also conscious that even with the change in the slab rate, the overall tariff for such consumers' remain well within the inflationary trend of around 5.5% over the Financial Year 2006-07 for the consumers availing power at 80% Consumption Ratio. In the incentive scheme at present tariff they pay around 279 paise per unit inclusive of demand charges. Applying an inflation of 5.5% for Financial year 2006-07 this requires additional rise of around

16 paise per unit. While designing the above slab, we have kept in mind so that consumers availing incentive tariff pay not more than 15 to 16 paise per unit. An illustrative example is given below:

Table 20
At HT

	Total Rate at revised tariff	Total Rate at existing tariff	Rise P/U	Rise (%)
Consumption Ratio (%)	Per KWH	Per KWH		
	(P/KWH)	(P/KWH)		
80%	308.68	293.05	15.63	5.3%
75%	314.59	301.26	13.33	4.4%
70%	321.34	310.63	10.71	3.4%
65%	329.14	321.45	7.69	2.4%
60%	338.24	334.07	4.17	1.2%
55%	348.53	346.26	2.27	0.7%
50%	360.88	360.88	0.00	0.0%

Table 20
At EHT

	Total Rate at revised tariff	Total Rate at existing tariff	Rise P/U	Rise (%)
Consumption Ratio (%)	Per KWH	Per KWH		
	(P/KWH)	(P/KWH)		
80%	295.05	279.302	15.75	5.6%
75%	301.26	287.922	13.33	4.6%
70%	308.34	297.773	10.57	3.6%
65%	316.53	309.141	7.38	2.4%
60%	326.07	322.402	3.67	1.1%
55%	337.35	335.348	2.00	0.6%
50%	350.88	350.883	0.00	0.0%

We would like to conclude that even the rate so arrived at are far lower than the normal tariff applicable to the consumer who operate upto 50%”.

28. From the above reasonings given by the State Commission in the impugned order, it is clear that the State Commission took cognizance of the fact that the cost of the electricity has increased by 41.90 paise on an average to the DISCOMS and balanced the Tariff for the HT and EHT consumers by reducing the incentive tariff for higher consumption. However the energy rates at load factor of 50% and below were not changed.

29. The tariff is to be determined by the State Commission on annual basis as per Regulation 5(1) (C) of Tariff Regulation, 2004. The tariff order shall continue to be in force for such period till it is amended or revoked by the Commission.

30. According to the Appellants, in view of the incentive tariff, various industries in HT Categories set up industries with a precondition of not reducing the Contract Demand (CD) during the next 03 years starting from 1.3.2005, so as to entitle them to avail a load factor based incentive at different slabs. However, it is to be stated that in the impugned order, the incentive tariff has not been actually withdrawn but it is simply revised considering the cost of the power following the provisions of Section 61 (d) of the Electricity Act, 2003.

31. In the tariff order for the Financial year 2007-08, the State Commission has reduced the rate of incentives for HT and EHT consumers for higher level of consumption without changing the basic tariff. It is to be observed that the revised energy rates arrived at are far lower than the normal tariff applicable to the HT and EHT consumers w.e.f. 1.4.2007. The table is as follows:

Load Factor (%)	HT	EHT
<i>Consumption upto 50%</i>	<i>300 p/u</i>	<i>290 p/u</i>
<i>>50% =<60%</i>	<i>225 p/u</i>	<i>202 p/u</i>
<i>> 60%</i>	<i>220 p/u</i>	<i>202 p/u</i>

32. The above rates of incentive tariff have been continued upto 2009-10 without any modification.

33. Therefore, contention raised by the Appellant that there has been withdrawal of incentive is not correct. The State Commission has observed that the consumers who have not reduced the contract demand for a period of 03 years w.e.f 1.4.2005 were entitled to get the incentive tariff. Thus, the State Commission has only reduced the rate of incentive for the HT and EHT consumers for the higher level of consumption. As a matter of fact, the revised rates arrived at, are far lower then the normal tariff applicable to the HT and EHT consumers.

34. It is contended by the Appellant that the withdrawal of the incentives and increase of tariff will

adversely affect the cost of the product in a highly competitive market. This contention is also untenable. In fact, this aspect has been taken note of by the State Commission and the contention of the Appellants relating to this aspect has been rejected by the State Commission by giving its valid reasonings as contained in para 5.48.1 of the Tariff Order.

35. According to the Appellant, the concession in favour of the power intensive industries having special agreement with North Eastern Electricity Company of Orissa Ltd (NESCO), which had been granted by the OERC in the RST Order for the Financial Year 2005-06 and continued in the RST Order for the Financial year 2006-07 has been altered in the RST order for the Financial Year 2007-08 dated 23.3.2007.

36. The perusal of the retail supply order for the Financial year 2005-06 and 2006-07 will show that the

proposal to allow special tariff in respect of the industries having special agreements was granted pursuant to the proposal of the NESCO which had entered into Special Agreement with some Ferro Alloy industries. The said order also shows that the benefit of the discount of 25% on the Energy Charges upto 50% Load Factor was granted only in respect of the Industries covered under Special Agreements. The said order further provides that in order to avail the benefit, the industries covered under the Agreement shall execute with the licensee for drawal of power for a period of three years with a monthly minimum guaranteed off take at a load factor of 80%. However, the Respondent CESU of Orissa did not have any special agreement with any consumer under power incentive , HT or EHT categories. The change the State Commission has made for the Ferro Alloys Industries drawing power from NESCO under special arrangement is replacement of load factor by 'consumption ratio'. However, this change has been made for other HT/EHT industries also and

reasoning for the same has been given in para 5.32.3 of the impugned order. The relevant extracts of para 5.32.23 are reproduced below:

“The reasons for adoption of this formula is that consumers are found to be defaulter achieving higher level of consumption and yet become eligible for Concessional tariff by keeping the maximum demand sufficiently low (in the denominator) of the ratio defined for “load factor” in para (2) (y) of the OERC Distribution (Condition Supply Code), 2004. This would defeat the purpose of providing for Concessional tariff, viz. achieving higher level of consumption.

37. In view of the above reasonings we do not find any infirmity in the finding of the State Commission.

38. In the impugned order as against the claim of the CESU for an Annual Revenue Requirement of

Rs.2,020.54 Crore, the State Commission has only allowed Rs.1,206.58 crores. While doing so, the State Commission has balanced the interest of all the stake holders. Therefore, any interference sought for by the Appellants in the impugned order will upset the balance of revenue requirement and revenue realization making it impossible for the Respondent to meet its revenue requirement.

39. M/s. Rawmet Ferrous Industries Pvt Limited, one of the Appellants has challenged the retail supply tariff order dated 23 March, 2007 for the Financial year 2007-08 mainly on the following grounds:

- (i) The Appellant could not avail the incentive tariff under the RST order for the year 2005-06 by entering into a Special Agreement since it could not avail the power supply on account of the delay in development of infra-structure of the

OPTCL. As a matter of fact, the Appellant was ready to avail power for furnance, briquette plant and other auxiliaries prior to March, 2006.

(ii) The Appellant could not challenge the supply tariff order for 2006-07 since the Commercial production had not commenced.

(iii) Although, the incentive tariff allowed in respect of HT and EHT consumers has been withdrawn by the RST order for the year 2007-08, the Special tariff has been continued in the case of four Export Oriented Ferro Alloys Units under the area of NESCO.

40. It is not disputed that the Appellant had entered into the Agreement with the Central Electricity Supply Utility of Orissa for supply of power for the first time only on 19th October, 2006. Therefore, the Appellant could

not avail the incentive tariff allowed under the RST order for 2005-06 and 2006-07. The contention of the Appellant that any HT and EHT industries could avail the incentive tariff for 03 years by entering into an agreement at any time during 2005-06 and 2006-07 is misconceived. The said benefit specifically confines only to such industries which entered to an agreement not to reduce their Contract Demand w e. f. Financial Year 2005-06. This was also clarified in the RST order for the Financial Year 2006-07.

41. Assuming that the Respondent was in a position to avail power supply in March, 2006, the RST order for 2005-06 granted the benefit of incentive tariff only in respect of HT/EHT industries which entered into an agreement for 03 years from 1.4.2005. Therefore, the Appellant in any case, could not avail of the incentive tariff as per the RST order for 2005-06.

42. The contention of the Appellant claiming parity with the four Export oriented Ferro Alloys industries which have been allowed special tariff, is not tenable for the reason that this Tribunal in appeal No.232 of 2006 by the judgment dated 12th November, 2007 upheld the said special tariff in respect of Four Export Oriented Ferro Alloys industries. In the said judgment this Tribunal specifically held that these four Export Oriented Ferro Alloys Industries constituted a separate and distinct class and the grant of Special Tariff in respect of such industries would not amount to discrimination.

43. Under these circumstances, the claim of the Appellant with regard to the disparity can not be accepted.

44. As indicated above, the tariff and condition of supply can be revised by the State Commission from time to time and the same has been provided both in the

Special Agreement as well in the relevant Regulations.

Let us quote the reference mentioned in the Special Agreement:

“5. The Tariff and Conditions of Supply mentioned in this Agreement shall be subject to any revision that may be made by the OERC from time to time”.

45. The above clause would make it clear that the HT consumer, the Appellant is bound by the Tariff and Conditions as amended by the State Commission from time to time. As indicated above this is provided in the Regulations also. Regulations 5 (1) (c) of the Regulation, 2004 provides as under:-

“5(1) (c) A Tariff Order shall continue to be in force for such period as may be indicated in the said order unless amended or revoked from the earlier”.

46. Thus the tariff revision for the HT and EHT Consumers has been clearly provided in the agreement as well as the Regulation.

47. Normally, the Retail Supply Tariff (RST) for any year is determined by the State Commission based on the Bulk supply Price, Transmission Charges and Distribution cost of the Company. If the Bulk supply price and the transmission cost in the input cost have increased, the State Commission has to increase the retail supply of the tariff also. In the impugned order dated 23.3.2007, the bulk supply price on a composite basis, including the Transmission Tariff, has increased by 35% in case of DISCOMS without corresponding increase in the retail supply tariff. Thus, the overall increase in Retail Supply Tariff is only 2% over the pervious period.

48. Therefore, it is clear from the reasoning given by the State Commission, it took note of the fact that the

cost of electricity has increased by 41.90 paise on an average to the DISCOMs and the incentive is to be made available to those of the EHT/HT consumers who would not reduce their contract demand during the next three Financial years starting from Financial Year 2005-06. However, the incentive in the form of energy charges above 50% load factor was reduced considering increase in power procurement cost.

49. It is pointed out by the Respondent that this Tribunal in the Appeal filed by M/S. Tata Steel Limited in Appeal No.232 of 2006, held that the in case one or more of the EOUs units subsequently cease to be 100% EOU units, it is open for the NESCO and State Commission to deal with such unit or units according to law. The relevant portion of the judgment of this Tribunal is as follows:

“33. We are presently concerned with the FY “2005-06. It is not disputed that the special agreements were entered into between NESCO and EOUs they were exporting nearly 100% of their product. In case one or more of them subsequently cease to be 100% EOU it is for NESCO and OERC to deal with such unit or units according to law. This cannot give the Joda Unit an additional ground for equality for reduced tariff. The Supreme Court has dealt with the question of negative quality in various judgments.....

50. According to the Appellant the increase in the RST is 10 to 13%. This increase is only over the energy charges for portion of incentive tariff for the consumption over 50% consumption ratio. The tariff upto 50% consumption ration and fixed charges remaining unchanged. Comparing the average cost to the consumer as per the new tariff order, the increase is only 5% to 6% which is far below then the increase in BSP (31%), the DISCOMS has to bear in cost.

51. One of the issues raised by the Appellants is cross subsidy by EHT/HT consumers. In the impugned order

the State Commission has not determined the cost of supply and cross subsidy by the subsidizing category of the subsidized category to show whether the objective of the Act and tariff policy to gradually reduce the cross subsidy has been met or not. However, the Respondent Distribution Company (WESCO) has, in its Written Submissions, provided the following position of average billing per unit for the LT, HT and EHT categories:

	Rs. Per unit.	
	<u>FY 2006-07</u>	<u>FY 2007-08</u>
LT	2.33	2.26
HT	3.41	3.42
EHT	2.76	2.79

52. The above data, though not of much use for determining the cross subsidy by various subsidizing categories, only indicates very small increase in average billing rate of HT & EHT categories. In our opinion, the State Commission should have clearly determined the

cost of supply and cross subsidy for each category of consumer in the impugned order. However, at this juncture after more than 4 years of date of the impugned tariff order, we do not want to remit the matter back to the State Commission considering the fact that the increase in tariff for EHT & HT consumers has been smaller compared to increase in cost of Bulk Supply Tariff. However, we direct the State Commission to determine the cost of supply and cross subsidy for each category of consumers in future tariff orders and ensure that the objective of the Act and the Policy to gradually reduce the cross subsidy is met.

53. It is submitted by the Appellant that in view of the incentives, various industries in HT category set-up industries with a pre-condition of not reducing the contract demand during the next three years so as to enable them to avail a load factor based incentive on different slabs. It would be stated that in the impugned

order for 2007-08, the incentive tariff has not been withdrawn. On the other hand, as pointed out the by Respondent, the incentive tariff component is revised considering the cost of power following the provision of Section 61 (d) of the Electricity Act.

54. As a matter of fact, the Appellant M/s. Utkal Chamber of Commerce, was one of the objectors in the public hearing held by the State Commission. It also submitted its suggestions before the State Commission. The Appellant was aware about the prayer of the Distribution Company to bridge the revenue gap in the then prevailing retail supply tariff and Bulk Supply Tariff through the combination of increase in retail supply tariff and reduction bulk supply tariff and Government subsidy etc., On these aspects, during the public hearing , the persons concerned were heard. Consequently, the incentive tariff is reduced for the class of consumers and not for any individual consumer.

55. The Appellant has raised the grounds with regard to Distribution loss reduction. This aspect has been dealt by this Tribunal in the judgment in Appeal No.77 to 79 of 2006. The relevant para is as follows:

“Para – 27 Here again in our view, it is for the Regulatory Commission to take a re-look of the entire matter, while undertaking truing up exercise. We hasten to add that the Commission need not stick to its earlier view, but it shall have a re-look in this respect by taking a practical view of the ground realities instead of proceeding on assumption and surmises. We are sure that Commission will take a re-look of the matter and grant the benefits to the Discoms”.

56. The State Commission in the impugned order has adopted the loss level mentioned in the Business Plan in line with the letter dated 1.2.2007.

57. The losses approved for 2006-07, the estimation for 2006-07 and the projected loss approved for the year 2007-08 by the Commission is as follows:

		<i>WESCO</i>	<i>NESCO</i>	<i>SOUTHCO</i>
<i>Approved Dist Loss 2006-07</i>		33.75%	33.00%	31.51%
<i>Losses 2006-07 (Estimated)</i>		36.50%	32.80%	43.40%
<i>Approved Dist. Loss for 2007-08</i>		25.00%	26.00%	30.40%

58. distribution loss target set up by the State Commission for the year 2007-08 is already too steep and difficult to achieve.

59. As pointed out by the Distribution Companies, the Distribution Companies are likely to incur loss of Rs. 73.54 crores due to fixation of Distribution Loss targets as per the Business Plan order. Therefore, there is no substance in the prayer of the Appellant that the shortfall in revenue on account of increase in Bulk Supply rate may be made good by reducing the Transmission and distribution loss target further.

60. SUMMARY OF OUR FINDINGS

(i) The impact of reduction of incentive on EHT/HT consumer's tariff is 5% to 6% as elaborated by the State Commission in the impugned order.

(ii) The Distribution Licensees have prayed for a combination of increase in Retail Supply Tariff, Reduction in Bulk Supply Tariff, Government Subsidy etc. The Distribution Companies envisaged the continuance or reduction of the then prevailing Bulk Supply Tariff for the year 2007-08 and for the Govt Subsidy while submitting the Retail Supply Tariff application for the year 2007-08.

(iii) There is an agreement between the Distribution Licensees and the HT Consumers for the Supply of Electricity in which the Appellants have consented for the change of tariff by the State Commission from time to time. The Appellant having agreed to pay the

energy charges as determined by the State Commission, can not turn around now and question the order of the Commission for revising the tariff. The State Commission has given various reasons while revising the incentives to a particular extent in HT and EHT category.

(iv) The State Commission is to be guided by Section 61 (d) of the Electricity Act. As per this Section, the State Commission shall have to take into consideration the consumer's interest and at the same time, the State Commission should ensure the recovery of the cost of the Electricity in a reasonable manner.

(v) In the impugned tariff order, the incentive tariff has not been fully withdrawn. On the other hand, the incentive tariff component is revised considering the cost of the power as per Section 61 (d) of the Act.

(vi) In the impugned tariff order, the State Commission has reduced the rate of incentive for HT and EHT Consumers for higher level of consumption without changing the basic tariff.

(vii) The State Commission has specifically observed that the consumers who have not reduced the contract demand for a period of three years w.e.f. 1.4.05 were entitled to get the incentive tariff. Thus, the State Commission has only reduced the rate of incentive for the HT and EHT consumers for the higher level of consumption.

(viii) The State Commission has given suitable and valid reasonings while reducing the rate of incentives in the HT and EHT category in Para 5.35 of the impugned order. These reasonings are perfectly justified.

(ix) According to the Appellant, the State Government issued a letter dated 1.2.2007 for continuance of the tariff without any hike till 2009 and these directions have not been obeyed. This is not correct. As per Section 12 of the Orissa Electricity Reform Act, 1985, the directions issued by the State Government shall be consistent with the object of the Act.

(x) As per Section 108 of the Electricity Act, the State Government can issue policy directions to the State Commission involving public interest. The State Commission is also entitled to issue policy directives considering the subsidies to be allowed for the supply of electricity to any class or any classes of consumers. If the State Government has to provide the subsidy or any tariff concession to the class of consumers, the same has to be mentioned and subsidy has to be provided upfront. In the letter dated 1.2.2007, nothing of this sort has been mentioned. Therefore, this cannot be treated as a direction under

Section 108 of the Act. That apart, the power of the tariff fixation of the State Commission can not be vested with any other authority of the State Government to issue any directions in the name of Policy directives.

61. In view of our above findings, we have to conclude that these Appeals have no merits and the same are liable to be dismissed. Accordingly, these are dismissed with specific directions to the State Commission to be followed for future as given in para 52 above. No order as to cost.

(Justice P.S. Datta) (Rakesh Nath) (Justice M. Karpaga Vinayagam)
Judicial Member Technical Member Chairperson

Dated: 24th May, 2011

REPORTABLE/NON-REPORTABLE